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No. 95-83

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ALAN MEGHRIG and MARGARET MEGHRIG,

Petitioners,

vs.

KFC WESTERN, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

Alan Meghrig, an individual, and Margaret Meghrig, an individual.

Respondent:

KFC Western, Inc., a corporation

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STATUTES INVOLVED

Section 7002 of the Resource Conservation and Recovery Act

("RCRA") [42 U.S.C. § 6972(a)(1)(B)] which provides, in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf —
>
> (1)(A)
>
> • • •
>
> (B) *against any person,* including the United States, and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, *who has contributed* or who is contributing *to the past or present* handling, storage, treatment, transportation, or *disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;*
>
> • • •
>
> *The district court shall have jurisdiction,* without regard to the amount in controversy

or the citizenship of the parties . . . *to restrain any person* who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste *referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both,* or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title. (Emphasis supplied.)

STATEMENT OF THE CASE

Respondent KFC Western, Inc. ("KFC") filed this action on May 29, 1992, seeking recovery of the cost of environmental remediation performed by KFC on its own property. Specifically, the complaint sought equitable restitution of such costs from Petitioners Alan and Margaret Meghrig, the property's prior owners and alleged polluters. The District Court did not reach the merits of Respondent's claims but instead, after two hearings, dismissed Respondent's complaint on the grounds that Section 7002 of RCRA did not afford retrospective restitutionary relief.

In December, 1992, Respondent appealed the District Court's judgment of dismissal to the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court's order, holding that RCRA does authorize citizen suits for restitution of remediation costs if the pollution remediated had at some time in the past posed an "imminent and substantial endangerment" to health or the environment. The Court of Appeals rejected Petitioners' argument that the language of the statute requires that "imminent and substantial endangerment" must exist at the time that a RCRA citizen suit is filed.

After unsuccessfully seeking a rehearing before the court of Appeals, Petitioners filed petition for writ of certiorari with this Court.

REASONS FOR DENYING THE WRIT

Petitioners do not raise any actual conflict among the circuit Courts of Appeals nor with prior decisions of this Court. In addition, since the filing of the petition for certiorari, the petition has become moot because Respondent, for financial reasons, has become unable to pursue this action and has agreed to dismiss his complaint. And, finally, Petitioners have not raised any questions of significant importance that warrant review of the Ninth Circuit's opinion.

I.

THE DECISION OF THE NINTH CIRCUIT DOES NOT CONFLICT WITH ANY DECISIONS OF OTHER CIRCUIT COURTS OR WITH ANY DECISION OF THIS COURT.

Supreme Court Rule 10 states that this Court will grant a petition for writ of certiorari "only when there are compelling reasons therefor." Among the reasons enumerated by the rule as compelling is that a federal decision for which review is sought is "in conflict with the decision of another United States court of appeals." Petitioners have stopped short of claiming that an actual conflict between the circuits was created by the Ninth Circuit's decision in this case, while at the same time suggesting that such a conflict "will likely exist" in the future as a result of their own projections about the decision soon to be rendered in a case currently pending before the Eighth Circuit Court of Appeals. The hypothetical conflict confected by Petitioners is insufficient to satisfy the criteria of Rule 10.

The only reported decision of another federal Court of Appeals to consider the issue of whether a prerequisite to a RCRA cost recovery action is "imminent and substantial endangerment to health or the environment" *at the time that the cost recovery action is filed* is in complete accord with the decision of the Ninth Circuit in this case. This earlier decision, *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1382-83 (8th Cir. 1989), analyzing a governmental cost recovery action under an identically worded companion section of RCRA (42 U.S.C. § 7003(a)) holds that "imminent and substantial endangerment" need not be present at the time of the *filing* of the cost recovery action so long as such endangerment existed at the time that an environmental clean-up was performed on the contaminated property.

Because *Aceto* does not establish any conflict among the circuits, Petitioners have sought to conjure one up by suggesting that a more recent case currently pending before the Eighth Circuit, *Furrer v. Brown*, No. 94-3281 EMSL (8th Cir., argued April 12, 1995), will interpret § 6972(a)(1)(B) in a manner that will overturn its earlier ruling in *Aceto*. Petitioners' projections concerning the upcoming ruling in *Furrer* appear to be based wholly upon conversations outside the record between Petitioners' counsel and counsel for one of the parties in *Furrer* concerning remarks made by various members of the Eighth Circuit panel during oral argument. No evidentiary support in the form of affidavits or a transcript of the oral argument in question have been offered in support of the bald assertions of fact made in Petitioners' brief. It is obvious that Petitioners' contention that the upcoming decision in *Furrer* will "likely" create a conflict among the circuits is completely premature. Petitioners are anticipating a decision that is not only not published but, very possibly, not yet written. A non-existent ruling such as this one cannot and does not satisfy the requirement of Rule 10 that there be a genuine conflict between the opinions of at least two circuits in order for a petition for certiorari to be granted.

Petitioners' claims that the Ninth Circuit's decision in this case is in conflict with prior rulings of this Court is as specious as their claims that a conflict exists between the rulings of different circuits. In support of their contention Petitioners cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987) and *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). Both of these authorities are completely inapposite. *Gwaltney* interprets a different citizen suit provision in the Clean Water Act and interprets it to mean that a citizen suit may not be brought against a defendant who violated a statutory obligation in the past, if the defendant is no longer purportedly "in violation". As the Ninth Circuit has concluded in its opinion in the instant action, § 6972(a)(1)(B) cannot be interpreted in this manner because it applies both prospectively and retrospectively to persons who contributed in the past to current endangerment. Similarly, *Sea Clammers* interprets the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctuaries Act — not the RCRA statute — as not providing private rights of action for anything other than injunctive relief. In reaching that conclusion, this Court examined in detail the legislative history of both acts as well as the statutory language. The statutory language and legislative history of RCRA are entirely different from the two federal acts interpreted in *Sea Clammers*. Hence, the decision of the Ninth Circuit in this case does not conflict in any way with this Court's earlier rulings in *Gwaltney* and *Sea Clammers* and, therefore, granting the petition for certiorari on this ground would be wholly improvident and contrary to the criteria set forth in Rule 10.

II.

THIS CASE IS MOOT BECAUSE, SINCE THE FILING OF THE PETITION FOR CERTIORARI, RESPONDENT HAS BECOME FINANCIALLY UNABLE TO PURSUE ITS CLAIMS AGAINST PETITIONERS AND HAS OFFERED TO DISMISS ITS ACTION CURRENTLY PENDING IN THE DISTRICT COURT PURSUANT TO FED. R. CIV. P. 41(a).

Article III of the Constitution requires that each case filed in a federal court, in order to be justiciable, present an actual "controversy". The long established rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time that the complaint is filed. *Steffel v. Thompson,* 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *SEC v. Medical Comm. for Human Rights,* 404 U.S. 403, 92 S. Ct. 577, 30 L. Ed. 2d 560 (1972).

A case may become moot and non-justiciable if the actual controversy dies at some point after a federal appellate court renders a ruling and while an appeal or petition for certiorari is pending before this Court. *Honig v. Doe,* 484 U.S. 305, 318, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988).

In this case, the actual federal controversy came to an end after Petitioners filed their petition for certiorari. After the petition was filed, Respondent became financially unable to bear the cost of continuing to litigate this action, and Respondent's counsel brought this fact to the attention of Petitioners and their counsel. In view of Respondent's inability to continue prosecuting his claims, Respondent has offered to dismiss its federal action pursuant to Fed. R. Civ. P. 41(a). Respondents have offered to agree to a dismissal with prejudice, which Respondent does not agree to, and will shortly file an appropriate motion to

dismiss in the District Court. Whatever the result of that motion, it appears clear that for purposes of this Court's review of the Ninth Circuit's panel opinion, the controversy over whether Respondent has the right to prosecute this action for equitable restitution against Petitioners has become entirely moot, and the petition for certiorari should be denied on grounds of lack of the requisite case or controversy.

III.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE RULINGS FOR WHICH REVIEW IS SOUGHT DO NOT CONCERN ISSUES OF SIGNIFICANT IMPORTANCE.

Petitioners primary argument is that the Ninth Circuit's opinion permitting citizen suits for equitable restitution under RCRA is significant because it creates a new statutory right of recovery for individuals that will give rise to a huge number of new cases. Not only is this contention unsupported by any empirical evidence that the dreaded avalanche of new cases has begun, but it is simply incorrect to claim, as Petitioners have done, that the Ninth Circuit's decision has made important new law. In fact, the important new law on this issue was made six years ago by the Eighth Circuit when it decided *United States v. Aceto Agr. Chem. Co., supra,* the first case to hold — interpreting a RCRA provision parallel to § 6972(a)(1)(B) that authorizes cost recovery actions by the government — that "imminent and substantial endangerment" need not exist at the time that an action for equitable restitution is filed so long as it existed at the time of the clean-up. It was the *Aceto* case, if any, that had the potential to open the floodgates of new litigation but did not do so. This case merely reiterates the principle first enunciated in *Aceto* and applies it to citizen suits, already clearly authorized by RCRA. In any event, the Ninth Circuit's decision is likely to

reduce federal court litigation by promoting settlement among parties who have contributed to environmental pollution.

IV.

THE DECISION OF THE NINTH CIRCUIT CORRECTLY INTERPRETED THE RCRA STATUTE.

Petitioners maintain that the Ninth Circuit erred in ruling that § 6972(a)(1)(B) of RCRA authorizes citizen suits for restitution. A close reading of the entire statute, as performed by the Ninth Circuit, reveals the incorrectness of Petitioners' position. In reaching its interpretation, the Ninth Circuit focused on a § 6973 provision worded almost identically to § 6972(a)(1)(B), which authorizes suits by the Administrator of the Environmental Protection Agency. The Ninth Circuit noted that this provision has been interpreted by several federal circuits to allow the government to seek restitutionary cost recovery (*United States v. Aceto Agric. Chem Corp., supra,* at 1383; *United States v. Northeastern Pharmaceutical & Chem Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Price*, 688 F.2d 204, 214) and concluded, quite logically, that its companion provision, § 6972(a)(1)(B), should be interpreted similarly to permit citizen suits for restitution.

Petitioners' contention that no such private right of action exists and that authorizing such a right runs counter to the very purpose of the statute's citizen suit provisions was rejected by the Ninth Circuit as eviscerating RCRA's ability to provide meaningful relief to members of the public most seriously affected by the presence of pollution:

> It would be unfair and poor public policy to interpret § 6972(a)(1)(B) as barring restitution actions. By doing so, we would

> make the citizen suit remedy meaningless in most cases for the very citizens who most deserve the remedy, namely innocent citizens, like KFC, who have a financial stake in the contaminated property as well as potential and actual clean-up liability. As in this case, the government often orders innocent parties, so-called "responsible parties" under the statute, to remedy discovered contamination on their property even though they did not cause the contamination or have any ties to the property when the contamination occurred. When the government orders clean-up, the innocent citizen must respond expeditiously to the order. There is no time to sue for "other equitable relief" in the form of a mandatory clean-up injunction against past polluters who may or may not still be on the scene . . . [A]s the Third Circuit has recognized, public policy concerns might favor allowing a plaintiff to clean contaminated property first and seek reimbursement later. [citation.]

49 F.2d 523-524.

In addition, the Ninth Circuit opinion correctly relies on an analysis of the statutory language in light of the RCRA statute's purpose in rejecting Petitioners' arguments that the "endangerment to health or the environment" must have been imminent at the time that the action for restitution was commenced. The Ninth Circuit opinion adopted the Eighth Circuit's reasoning in *United States v. Aceto Agric. Chem. Corp., supra,* that the purpose of RCRA is "to give broad authority to the courts to grant all relief necessary to ensure complete protection

of the public health and the environment" and that the requirement that the endangerment be imminent as of the time that the restitution action was filed would both "defeat this purpose" and would be "absurd and unnecessary". In this regard, the reasoning of both the Third and the Ninth Circuits is highly persuasive and should be adopted by this Court.

CONCLUSION

For the reasons stated the Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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